2 Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WENDELL PIKE,

Petitioner,

v.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. What is the appropriate period of limitations in Kentucky for an insured's contractual claim against his or her own insurance company for underinsured motorist [hereinafter "UIM"] benefits;

2. Can an insurance company contractually shorten the applicable period of limitations with its insured by inserting language in the policy to that effect;

3. If an insurance company can permissibly-contractually limit the period of limitations by inserting language in the policy, what period of limitations for UIM claims is reasonable under Kentucky law;

4. Can an insurance company's own actions after the limitations period in the policy has allegedly expired estop the insurance company from raising the limitations issue as a defense and/or result in a waiver of the limitations defense; and

5. In Kentucky, the payment of an insured's medical bills by his or her personal injury protection [hereinafter "PIP"] benefits carrier tolls the statue of limitations – should the payment of an insured's medical expenses by a worker's compensation carrier likewise toll the limitations period.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The Petitioner is not a subsidiary or affiliate of a publicly owned corporation.

There is not a publicly owned corporation that has a financial interest in the outcome of this matter.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of Case 1

A. Factual Background 3

B. Proceedings Below 5

Reasons for Granting the Petition 6

I. The fifteen (15) year period of limitation for contracts applies to a first party claim for UIM benefits. 6

II. GEICO's unilateral attempt to limit the period of limitations to two (2) years is unreasonable 7

III. GEICO is estopped by its own actions from raising the period of limitations as a defense 14

IV. Equity and fairness warrant reversal. 14

Conclusion 16

Appendix

Appendix A – Sixth Circuit Opinion – 03/29/06 ..... 1a

TABLE OF AUTHORITIES

CASES

Brown v. State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001) 3, 7, 10, 11, 12, 13, 14, 16

Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993) 2, 4, 5

Earle v. Cobb, 156 S.W.3d 257 (Ky. 2005) 6

Elkins v. Kentucky Farm Bureau Mut. Ins. Co., 844 S.W.2d 423 (Ky. App. 1992).....7, 8, 9, 11

Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331, 333 (Ky. 1995) 3, 7, 9, 10, 11, 12, 13, 14, 16

Stewart v. Pantry, Inc., 715 F.Supp.1361 (W.D. Ky. 1988) 14

STATUTES

28 U.S.C. § 1441 2

KRS 304.39-230(6).....4, 13

KRS 304.39-320 .....2, 4, 5, 14, 16

KRS 413.090(2).....6, 11, 13, 16

RULES

F.R.C.P. 12(b)(6) 2

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit dated March 29, 2006, affirming the decision of the District Court was not recommended for full-text publication.

The Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky at Louisville dated February 24, 2005, are not officially reported.

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered March 29, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. § 1441, KRS 304.39-230, KRS 304.39-320, and KRS 413.090.

STATEMENT OF THE CASE

This is a contractual case for UIM benefits arising from a motor vehicle collision. Initially, Petitioner, through his prior counsel, the honorable Paul Musselwhite, made a personal

injury claim against Ms. Stear to obtain her liability insurance proceeds with Sentry Insurance. Sentry promptly agreed to settle that claim for the full amount of its policy limits of $50,000.

As is required under Kentucky law, Petitioner, by counsel, and pursuant to the Kentucky decision of Coots v. Allstate, 853 S.W.2d 895 (Ky. 1993) and KRS 304.39-320, put the Respondent on notice of the tentative settlement and sought the Respondent's permission to effectuate the settlement. Respondent elected to preserve its subrogation rights against Ms. Stear for any UIM benefits that it may pay to Petitioner by substituting payment and by sending the Petitioner a check for the $50,000 as is required by KRS 304.39-320.

Petitioner then asserted a first-party contractual claim for UIM benefits against the Respondent and attempted to negotiate a settlement of his UIM claims. Respondent denied his claim for UIM benefits on the grounds that the contractual two-year period of limitations in its policy had expired.

Accordingly, Petitioner was forced to file a first party contractual claim in the Hardin Circuit Court against the Respondent to recover his UIM benefits. Pursuant to 28 U.S.C. § 1441, Respondent removed this action to the United States District Court for the Western District of Kentucky at Louisville since complete diversity of citizenship was present and the amount in controversy exceeded $75,000.

Thereafter, pursuant to F.R.C.P. 12(b)(6), Respondent moved the Western District Court to dismiss Petitioner's Complaint on limitations grounds based on the two (2) year limitations provision in its policy. The Western District Court granted Respondent's Motion to Dismiss without a hearing and

without allowing the parties to take any discovery whatsoever. The Sixth Circuit Court of Appeals affirmed the dismissal.

Petitioner believes the District Court and Sixth Circuit erred and failed to follow Kentucky law as set forth in Brown v. State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001), and Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331, 333 (Ky. 1995), which together hold that the statutory 15-year period of limitations for contracts actions applies to first party contractual UIM claims

A. Factual Background

On November 21, 2000, Tammy Stear ran a stop sign causing a severe and violent collision with Petitioner's United States Postal Service truck at the intersection of 16th Street and Rowan Street in Louisville, Jefferson County, Kentucky. Petitioner sustained a serious back injury from the collision.

At the time of this collision, Petitioner was acting within the course and scope of his employment as a mail carrier with the United States Postal Service. Petitioner had procured personal automobile insurance with the Respondent, whose policy provided, among other benefits, UIM coverage.

Shortly after the collision, Petitioner began receiving medical treatment. Due to the fact that he was "on the job" at the time of the collision, his worker's compensation insurance company had primary and exclusive responsibility for payment of his medical bills and expenses. Ordinarily, an injured motorist in Kentucky has his or her medical bills paid by a No-Fault or "PIP" [personal injury protection] carrier, who in this case would be the Respondent.

In fact, because Petitioner's worker's compensation insurance was primary, Respondent would not pay any PIP benefits, and even today, Petitioner's PIP carrier, GEICO has never paid any amount of money to or on behalf of the Petitioner under its PIP coverage.

Since there were no PIP payments in this case, the period of limitations for filing a personal injury claim against the tortfeasor was never extended beyond 2 years, as it would have been if his medical expenses were paid by a PIP carrier pursuant to KRS 304.39-230(6). Petitioner is still receiving medical treatment and his worker's compensation insurer is still paying his medical bills related to injuries sustained in this motor vehicle accident.

The tortfeasor, Tammy Stear, had a policy of liability insurance with Sentry Insurance Company, which policy provided $50,000 in per person liability insurance coverage.

On or about May 15, 2003 (2 ½ years after the date of the accident), Petitioner settled his personal injury claims against Tammy Stear for the amount of her liability policy limits of $50,000. Petitioner thereafter pursued contractual claims for UIM benefits with his company, Respondent.

As is required by KRS 304.39-320, Kentucky's UIM statute, Petitioner promptly and properly sent a letter to the Respondent, advising them of the tentative settlement with the tortfeasor Tammy Stear and providing the Respondent an opportunity to protect its subrogation rights against Ms. Stear.

On or about June 19, 2003 (over 2 ½ years after the period of limitations expired according to Respondent under its policy), Respondent advised that it was electing to protect its subrogation rights against Ms. Stear, pursuant to Coots v.

Allstate, 853 S.W.2d 895 (Ky. 1993) and KRS 304.39-320, and substituted payment by sending a check to the Petitioner in the amount of $50,000.00. Respondent substituted the settlement offer to protect its subrogation rights on Petitioner's UIM claim - a claim it now says did not exist at the time.

On January 19, 2004, (7 months after Respondent substituted its payment and 8 months after settling his claim with the tortfeasor), Petitioner, by counsel, the honorable Paul Musselwhite, filed a first-party contractual claim against Respondent in the Hardin Circuit Court, Division II, Case No. 04-CI-00249, to recover UIM benefits under his policy of insurance.

On or about March 3, 2004, Respondent removed the action to the United States District Court for the Western District of Kentucky, Louisville Division. Petitioner agrees and stipulates that venue and jurisdiction are proper in federal court since complete diversity of citizenship among the parties exists and since his claim for damages under the contract of insurance is in excess of the $75,000.00 jurisdictional requirement.

B. Proceedings Below

On February 24, 2005, the United States District Court for the Western District of Kentucky at Louisville entered a Memorandum Opinion and Order dismissing the Petitioner's Complaint.

On March 29, 2006, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Western District of Louisville.

REASONS FOR GRANTING THE PETITION

This case presents an important question of Kentucky law that has not been resolved but should be settled by this Court.

I. THE FIFTEEN (15) YEAR PERIOD OF LIMITATION FOR CONTRACTS APPLIES TO A FIRST PARTY CLAIM FOR UIM BENEFITS.

Kentucky law mandates that the period of limitation for a written contract, such as an insurance policy, is fifteen years from the date of the loss. Specifically, KRS 413.090(2) provides, in relevant part, as follows:

> [T]he following actions shall be commenced within fifteen (15) years after the cause of action first accrued:
>
> > (2) An action upon a recognizance, bond or written contract.

KRS 413.090(2). A policy of insurance is a written contract between the insured and the insurer. Under Kentucky law, a first party claim for UIM benefits is contractual in nature. Earle v. Cobb, 156 S.W.3d 257 (Ky. 2005).

Petitioner's claim for UIM benefits against Respondent in this case sounds in contract, not tort. Accordingly, the Kentucky General Assembly has set forth in KRS 413.090(2) the applicable period of limitations for a claim for UIM benefits, and that limitations period is fifteen (15) years.

II. GEICO'S UNILATERAL ATTEMPT TO LIMIT THE PERIOD OF LIMITATIONS TO TWO (2) YEARS IS UNREASONABLE.

There is some authority under Kentucky law that allows an insurance company to insert language into their policy to reduce the period of limitations, but the period of limitations must be reasonable. See Brown v. State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001); Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995); and Elkins v. Kentucky Farm Bureau Mut. Ins. Co., 844 S.W.2d 423 (Ky. App. 1992).

The first of these three cases was rendered in 1992 by the Kentucky Court of Appeals in Elkins v. Kentucky Farm Bureau Mut. Ins. Co., 844 S.W.2d 423 (Ky. App. 1992). That case was followed shortly thereafter in 1995 by the Kentucky Supreme Court in Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995). The most recent decision on this issue came in 2001, some six years after the opinion in Gordon, from the United States District Court for the Western District of Kentucky in Brown v. State Auto, 189 F.Supp 2d 665 (W.D.Ky. 2001).

A. Elkins v. Kentucky Farm Bureau

In Elkins, Kentucky Farm Bureau ["KFB"] provided automobile insurance coverage, including uninsured motorist ["UM"] coverage, to Ronna Elkins. Elkins, 844 S.W.2d at 423-424. In that case, Ms. Elkins was involved in a motor vehicle accident on April 29, 1989. Id. at 423. Approximately two weeks later, the tortfeasor pled guilty to driving without proper insurance and Elkins' attorney notified KFB of her intent to pursue a claim for UM benefits under her policy. Id. at 423-424. Ms. Elkins continued to treat medically for more

than one year after the date of the accident as indicated by her PIP log with KFB. Id. at 424.

In December of 1990, approximately 20 months after the date of the accident, Ms. Elkins filed suit against the tortfeasor and KFB. Id. Thereafter, KFB moved for summary judgment on limitations grounds, which was granted by the trial court who found that KFB's policy required that a suit for UM benefits be brought within twelve months of the date of the loss. Id. at 423.

On appeal, the Kentucky Court of Appeals reversed that decision finding that the terms of the contract unreasonably restricted Ms. Elkins right to benefits she had bought and paid premiums for under her own policy of insurance. Id. at 425. In reaching its decision, the Elkins Court noted that pursuant to the Kentucky Motor Vehicle Reparations Act [hereinafter "MVRA"], KRS 304.39 *et seq.*, the statute of limitations for filing a personal injury claim related to a motor vehicle accident was a minimum of two years from the date of the accident. Id. at 424-425.

> [I]t makes no sense to allow two years (or more) to file a suit against an uninsured or underinsured tort-feasor and yet permit the insurer to escape liability if the suit involving it is not filed within one year. Such would not only be an unreasonably short time, but it would completely frustrate the no-fault insurance scheme.

Id. at 424. As a result, the Court of Appeals held that KFB's period of limitation unreasonable and reversed the decision of the trial court. Id. at 425.

Importantly, in the concurring opinion, Judge Wilhoit addressed an issue that would be raised again in Gordon, in stating that he was "unable to see how an action based on a contract claim can 'fall within the two-year limit allowed by *KRS 304.39-230(6)*,' which deals with tort actions." Id. at 425. Thus, the Elkins decision noted the distinction that is crucial in this case - the difference in applying a limitations defense in a tort action versus a contract action.

B. Gordon v. Kentucky Farm Bureau

In Gordon, KFB was once again the focus of a decision regarding an attempt to shorten an insured's right to bring a suit against his/her own insurance company for first party benefits. Gordon, 914 S.W.2d 331. In Gordon, KFB provided automobile insurance coverage, including UM coverage, to Charles Gordon. Id. at 331.

On July 26, 1990, Mr. Gordon's son, Robin, was involved in a motorcycle accident while a passenger of Michael Gilvin, an uninsured motorist. Id. Mr. Gordon's policy with KFB, despite the ruling in Elkins, several years earlier, still contained a policy provision that any claim for UM benefits be brought within one-year from the date of the loss. Id.

On December 18, 1992, Gordon filed suit for UM benefits under the policy naming KFB as a defendant. Thereafter, the trial court granted summary judgment to KFB on two grounds: [1] that the claim was barred by the two year statute of limitations set forth in the MVRA in KRS 304.39-230(6), and (2) that a two (2) year delay in notice had prejudiced KFB. Id. at 332. That decision was then affirmed by the Kentucky Court of Appeals. Id.

On further appeal to the Kentucky Supreme Court, that Supreme Court stated, "[t]he primary issue before this Court is what time limitation applies to a claim for uninsured motorist benefits in view of the decision of the Kentucky Court of Appeals in *Elkins v. Kentucky Farm Bureau Mutual Insurance Company, 844 S.W.2d 423 (Ky. App. 1992).*" Id. at 332.

The Gordon Court then aptly discussed Judge Wilhoit's foresight regarding the use of a tort statute of limitation as related to a contract claim. Id. The Kentucky Supreme Court agreed with the dissenting opinion from the Kentucky Court of Appeals and stated "KRS 304.39-230(6) does not purport to limit actions on contracts..." Id. "[We] find it illogical to adopt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tort-feasor is in fact an uninsured motorist." Id.

C. Brown v. State Auto

In the most recent decision on this issue arising out of federal court in the Western District of Kentucky, Brown, Plaintiff Jeanne Brown was injured in a motor vehicle accident and filed a contractual claim against her UIM carrier, State Auto. Id. at 666. Ms. Brown's accident occurred June 23, 1996, and she did not bring her claim against her UIM carrier until March 30, 2001, over four (4) years and nine (9) months after the accident date. Id. at 667-668. It was undisputed in that case that Brown filed her complaint after the expiration of the 2 year limitations period in State Auto's contract of insurance and after the expiration date of 2 years from the date of her last PIP payment. Id.

In Brown, the policy of insurance issued by State Auto required the insured to file a claim for UM or UIM benefits within two years from the date of the loss. Id. at 667. The Court wrote, "if the two year contractual limitation in the policy is reasonable, the Plaintiff's complaint is time barred and must be dismissed. If the limitation is unreasonable, the fifteen year statute of limitations governing actions on written contracts applies and the Plaintiff's claims may proceed." Id. at 668.

The Brown Court reviewed and analyzed the decisions of Elkins and Gordon in reaching its decision and stated,

> [t]he Court does not agree with the Defendants' contention that Gordon "[held] that two years is a 'reasonable' limitation for filing a first party contract action[.]" (Defs.' Reply, p. 2.) Gordon contains no such holding. That court addressed the issue of what limitations period to apply to an uninsured motorist claim where a contractual limitation had already been deemed unreasonable pursuant to Elkins. The question of reasonableness was not an issue before the court.

Brown, at 670 [emphasis added]. In Brown, the Court found State Auto's 2-year period of limitation unreasonable and therefore invalid. Id. at 671. **As a result, the Court applied the 15-year statute of limitations for contract actions, KRS 413.090(2), to Brown's first party contractual claim for UIM benefits and held that her Complaint was timely filed. Id.** The Brown decision clearly and unequivocally stands for the proposition that UIM claims in Kentucky are to be afforded a 15-year limitations period since they are purely contractual actions.

D. The Western District And The Sixth Circuit Misapplied Kentucky Law

In deciding this case, the Western District Court and the Sixth Circuit Court of Appeals misapplied Kentucky law as set forth in Brown v. State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001) and Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995).

On Page 2 of the Memorandum Opinion, the Western District Court states, "[u]nder Kentucky law, the period for filing an action to recover UIM benefits is two years from the date of the injury or from the last basic or added reparation payment made by any reparation obligor, whichever last occurs. KRS 304.39-230(6)." This is incorrect.

The Western District and Sixth Circuit are taking the position of the Kentucky Court of Appeals before they were reversed in Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995), in which the Kentucky Supreme Court wrote:

> In the present case, the Court of Appeals, referring to the dicta in Elkins, specifically held that the two-year statute in the MVRA does apply. **This Court agrees with Judge Huddleston's dissent, in which he notes that *KRS 304.39-230(6)* does not purport to limit actions on contracts**, but by its very terms limits an action for tort liability not abolished by *KRS 304.39-060.* " This Court finds it illogical to adopt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tort-feasor is in fact an uninsured motorist.

Gordon, 914 S.W.2d at 332 [emphasis added]. The Gordon Court specifically and emphatically stated that KRS 304.39-230(6) does not govern contract claims such as UM and UIM actions, and further states that it would be illogical to adopt such a rule that "would require a plaintiff to sue his own insurer before discovering whether or not the tort-feasor is in fact an uninsured motorist." Id.

This language clearly states that to adopt a rule similar to the period of limitations within KRS 304.39-230(6) would be illogical. Yet that is the very language used by the GEICO policy in question, as set forth in the Memorandum Opinion on Page 2, "[a]ny legal action to recover underinsured motorist benefits must be commenced within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident."

The Western District Court noted that it was not utilizing the period of limitations under the MVRA, but rather a reasonableness inquiry that allows a flexible limitations period. That approach is unprecedented and is not called for by either Brown or Gordon.

The Sixth Circuit's opinion held that GEICO's period of limitation, which is exactly that of the MVRA is permissible, despite language to the contrary by the Kentucky Supreme Court. As such, both lower courts erred in finding the two year period of limitations within the GEICO policy reasonable.

Since the period of limitation in Respondent's policy is unreasonable, in Kentucky, the period of limitation for Petitioner's first party contractual claim for UIM benefits reverts to the standard period of limitations of fifteen (15) years for contracts as set forth in KRS 413.090(2). See Brown v.

State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001); Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331, 332-333 (Ky. 1995).

III. FURTHERMORE, GEICO IS ESTOPPED BY ITS OWN ACTIONS FROM RAISING THE PERIOD OF LIMITATIONS AS A DEFENSE.

In a federal case arising from the Western District of Kentucky, Stewart v. Pantry, Inc., 715 F. Supp. 1361 (W. D. Ky. 1988), a group of employees were dismissed from their job based on results from their polygraph tests and subsequently filed an action against their employer and the polygraph administrators for wrongful discharge, infliction of severe emotional distress, defamation, invasion of privacy and negligence. Id. The Western District Court held that the employees' consent to the polygraph examination waived their claims. Id.

Likewise, by its consent to the Wendell Pike-Tammy Stear settlement and by its actions in substituting payment to protect its subrogation rights pursuant to KRS 304.39-320, Respondent has clearly waived its right to claim that its limitations provision bars Petitioner's claims. Respondent's own actions clearly operate as a waiver to their now tardy raising of the defense of limitations.

IV. EQUITY AND FAIRNESS WARRANT REVERSAL.

In addition to legal rationales set forth hereinabove, equitable principles mandate that the Western District's Memorandum Order and the Sixth Circuit's opinion be

reversed and vacated. In this case, Petitioner was injured while on-the-job for the U. S. Postal Service. Thus, his worker's compensation insurance carrier has had the primary and exclusive responsibility to pay his medical bills. Even if the Petitioner now submitted his bills to his PIP carrier, GEICO, they would be denied and rejected as untimely and since his worker's compensation insurer has the sole responsibility for payment of his medical bills.

If Petitioner had not been on-the-job, then his PIP carrier, which is GEICO, would have paid his medical bills. In addition, the statute of limitations would have been tolled by each such PIP payment.

Equity and fundamental fairness demand that the Petitioner should not have his claims dismissed in this case simply because his bills were paid by worker's compensation rather than a PIP carrier. If this Court affirms the Western District, the effect of that ruling would be that Petitioner, an injured party who was working, would be prejudiced by a shorter limitations period than an injured party who was not working. This would be contrary to public policy in that it would treat similarly situated injured parties differently depending on the arbitrary and capricious distinction of whether their medical bills were paid by a worker's compensation carrier or a PIP carrier, or, whether they were working or were not working at the time of an accident.

The practical effect of affirming the Western District would mean that plaintiffs would lose their UIM claims because of something over which they have no control - which insurance company has primary responsibility for payment of his medical bills. It is manifestly unfair that Petitioner be penalized and forfeit a very viable and valuable UIM claim, for which he paid premiums for years, on limitations grounds

simply because worker's compensation paid his medical bills rather than a PIP carrier.

CONCLUSION

KRS 413.090(2) sets forth a 15-year statute of limitations for all claims based upon a written contract. Kentucky law is clear that an insurance policyholder's claim for UIM benefits is contractual in nature.

In addition to the statute, there case law directly on point. Pursuant to Brown v. State Auto, 189 F.Supp.2d 665 (W.D. Ky. 2001) and Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995), an insurance company cannot unreasonably unilaterally and without input from its insured insert language into the policy to shorten the limitations period. Respondent GEICO seeks to reduce a 15-year statute for contracts down to a mere 2 years. A 13-year reduction is not reasonable by any estimation. Brown holds that UIM claims in Kentucky deserve a 15-year limitations period, and rightfully so.

In addition, GEICO's payment of Tammy Stear and Sentry Insurance Company's settlement offer of $50,000 pursuant to KRS 304.39-320, Kentucky's UIM statute, after their alleged limitations period had expired, equitably estops GEICO from asserting a limitations defense in this case. Thus, by its actions, GEICO has effectively waived its right to rely on the limitations defense in its policy.

Equity and fairness dictate that Petitioner have his day in court regarding insurance coverage for which he paid a premium. While GEICO'S policy language, in theory, does afford the potential of a period of limitations greater than the

minimum under the MVRA, when applied to Petitioner, his period of limitation could never be greater than the minimum under the MVRA because there was never any PIP paid, or to be paid, due to his status as a federal employee whose medical benefits where paid by federal worker's compensation. PIP payments would have tolled the statute of limitations; whereas, worker's compensation payments did not. It is arbitrary to punish the Petitioner with dismissal of his UIM claims simply because he was not eligible for PIP payments due to his employment status at the time of the wreck.

For the foregoing reasons, Petitioner Wendell Pike respectfully submits that the decisions of the United States District Court for the Western District of Kentucky and the Sixth Circuit Court of Appeals should be reversed and this matter should be remanded for further proceedings.

This the 26th day of June, 2006.

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This is to certify that a true and exact copy of the foregoing was this day faxed, hand-delivered or placed in the U.S. Mail addressed as follows:

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This the 26th day of June, 2006.

Counsel for Petitioner

No. 05-5481
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WENDELL PIKE — Plaintiff-Appellant

v.

GOVERNMENT EMPLOYEES INS. CO., — Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: MOORE and McKEAGUE, Circuit Judges; and POLSTER, District Judge.

Dan Aaron Polser, District Judge. Plaintiff Wendell Pike appeals the district court's dismissal of his underinsured motorist ("UIM") claim against his automobile insurance carrier, Defendant Government Employees Insurance Co. ("GEICO"). Pike was injured in a motor vehicle accident caused by the negligence of an underinsured motorist. After settling his claim against the tortfeasor's insurance carrier for the policy limits, Pike notified GEICO of the settlement and made a demand for payment of damages in excess of the settlement figure. GEICO denied Pike's request, and Pike brought a claim for UIM benefits against GEICO in state court. GEICO removed the case to federal district court and promptly moved to dismiss Pike's claim on the basis that it was filed after the limitation period contained in the policy expired. Pike contended that the contractual limitation period was unreasonable under *Brown v. State Auto*, 189 F.Supp.2d 665

(W.D. Ky. 2001) and *Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky. 1995); thus, the 15-year statutory limitation period for contract claims should apply to his claim.

The district court granted GEICO's motion and dismissed the case as time-barred. The court reviewed *Brown* and *Gordon*, distinguished those cases and concluded that the contractual limitation period set forth in the parties' contract was reasonable. For the following reasons, we **AFFIRM.**

I. BACKGROUND

This case arises from a motor vehicle accident that occurred in Louisville, Kentucky on November 21, 2000 between Wendell Pike and Tammy Stear. The collision occurred while Pike was working as a mail carrier for the United States Postal Service. As a result of the collision, Pike sustained serious injuries. Since he was working at the time of the accident, his medical bills and associated expenses were paid, and continue to be paid, by the Postal Service's worker's compensation insurance carrier.

The tortfeasor, Tammy Stear, had a policy of liability insurance which provided a maximum of $50,000. On or about May 15, 2003, Pike settled his personal injury claim against Stear for the policy limits.

On May 21, 2003, Pike's counsel sent a letter to GEICO notifying it of the settlement and providing GEICO an opportunity to protect its right of subrogation against Stear, pursuant to K.R.S. 304.39-320 and *Coots v. Allstate*, 853 S.W.2d 895 (Ky. 1993). This is the first time GEICO was informed that Pike was involved in a car accident. GEICO sent notice of its election to protect its subrogation rights and its intent to substitute payment of the policy limits of the tortfeasor in the amount of $50,000. On September 25, 2003, Pike demanded the full limit of GEICO's UIM coverage.

GEICO denied Pike's claim because he failed to comply with the policy's notice provision and because he brought his claim after the limitation period contained in the policy had expired. Under the relevant policy provision,

> [s]uit will not lie against [GEICO] unless the insured and his legal representative have fully complied with all the policy terms. Any legal action to recover underinsured motorist benefits must be commenced within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident.

J.A. at 3. Under the Kentucky Motor Vehicle Reparations Act ("MVRA"), any action brought in tort for injuries sustained in a car accident must be commenced either within two years of the date of the accident, or within two years of the date the final basic or added reparation ("PIP") benefit was paid, whichever is later. *Brown*, 189 F.Supp.2d at 666 (citing K.R.S. 304.39-230).

On February 5, 2004, Pike sued GEICO in state court for UIM coverage. GEICO removed the case to federal court based on diversity jurisdiction and filed a motion to dismiss. GEICO argued that Pike's claim should be dismissed because it was time-barred and because Pike failed to join an indispensable party – presumably, Tammy Stear. Pike countered that his claim was not time-barred because the general, fifteen-year statute of limitations for contract claims applied to his claim under the authority of *Brown*. Moreover, equity and fairness dictated that his UIM claim should not be dismissed simply because his medical bills were paid by worker's compensation and not his PIP carrier. Pike also argued that Tammy Stear was not an indispensable party

because this was a direct contract action against the insurance company.

The district court granted GEICO's motion based on the expiration of the contractual limitation period, finding it unnecessary to rule on the notice issue. The district court contrasted the limitation period in GEICO's policy, which was a flexible period that dovetailed with the limitation period in the MVRA, with the rigid two-year period in the policies which the courts in *Brown* and *Gordon* deemed unreasonable. The court below quoted the reasoning of the district court in *Brown*:

> This court believes that the fair reading of *Gordon* demonstrates three key points: (1) that the MVRA does not govern contract-based actions seeking underinsured motorist benefits; (2) that any contractual limitations period must be reasonable; and (3) that it is illogical – in other words, unreasonable – to require a plaintiff to sue her own insurer for underinsured motorist benefits before being required to discover whether or not the tortfeasor is in fact an uninsured motorist. This Court believes that the Kentucky Supreme Court would not make any distinction between uninsured motorist and underinsured motorists in this context, and would likewise find it unreasonable to require an insured to sue her insurer for underinsured motorist benefits prior to being required to sue the tortfeasor and thus to determine whether or not the tortfeasor is in fact underinsured.

J.A. at 3 (quoting *Brown,* 189 F.Supp.2d at 670-71). The court below read *Brown* as holding that the fifteen-year statute of

limitation for bring contract claims governs a claim for UIM benefits unless the insurance policy contains a reasonable limitation period prescribing a shorter length of time. Because the GEICO policy avoided the flaw in the policies analyzed by the *Brown* court, it was reasonable and Pike's lawsuit was time-barred. Pike filed a timely notice of appeal.

II.

A. Jurisdiction

The district court had jurisdiction over this diversity case pursuant to 28 U.S.C. § 1332, because the parties are citizens of different states and the amount in controversy exceeds $75,000. *See Lee-Lipstreu v. Chubb Group of Ins. Cos.*, 329 F.3d 898, 899-900 (6th Cir. 2003). We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

B. Standard of Review

A district court's decision granting a motion to dismiss based on the statute of limitations is reviewed *de novo*. *Simon v. Pfizer Inc.*, 398 F.3d 765, 772 (6th Cir. 2005); *Hogan v. United States,* 42 Fed. Appx. 717, 721 (6th Cir. 2002) (citing *Tolbert v. State of Ohio Dept. of Transp.*, 172 F.3d 934, 938 (6th Cir. 1999).

C. Merits

The issue on appeal is whether a contractual limitation for bringing UIM claims that tracks the statutory MVRA limitation period is unreasonable under *Brown* and *Gordon*. In

Kentucky, the statutory period of limitation for a written contract, such as an insurance policy, is fifteen years after the cause of action accrued. K.R.S. 413.090(2). Parties to an insurance contract may, however, limit the time in which to bring a claim against an insurance carrier so long as the time limit is reasonable. *Webb v. Kentucky Farm Bureau Ins. Co.*, 577 S.W.2d 17, 18 (Ky. Ct. App. 1978) (citing *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386 (1868); *Lee v. Union Central Life Ins. Co.*, 56 S.W. 724 (Ky. Ct. App. 1900)). *See also Brown,* 189 F.Supp.2d at 670; *Gordon*, 914 S.W.2d at 333; *Elkins v. Kentucky Farm Bureau Ins. Co.*, 844 S.W.2d 423, 427 (Ky. Ct. App. 1992). Where a policy limitation is deemed unreasonable, the fifteen-year statutory period for commencing contract claims in Kentucky applies. *Gordon*, 914 S.W.2d at 332.

With respect to uninsured or UIM contracts, Kentucky courts have held that a one-year policy limitation for bringing UIM claims against one's insurance carrier is unreasonable because it would require the insured to sue his carrier for UIM benefits long before he is required to sue the tortfeasor. *Elkins*, 844 S.W.2d 423; *Gordon*, 914 S.W.2d 331. Also, a policy limitation requiring an insured to sue his UIM insurance carrier no later than two years from the date of the accident has been deemed unreasonable because it would require the insured to sue his carrier "before being required to discover whether or not the tortfeasor is in fact an uninsured [or underinsuded] motorist." *Brown*, 189 F.Supp.2d at 671. This is presumably because the insured has no reason to investigate the tortfeasor's insurance status so long as reparation benefits are being paid.[1]

---

[1] "A fundamental purpose of the [MVRA] is to provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created." *York v. Kentucky Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 294-95 (Ky. Ct. App. 2005) (citing K.R.S. 304.39-010 (2)). "the entire MVRA scheme reflects a zero-sum approach where

There is, however, no case where a Kentucky court analyzed whether a policy limitation like the one in the instant case is reasonable. The cases cited by Pike in support of his position are distinguishable because none of those cases dealt with the flexible policy limitation involved in this case, i.e, "the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident."[2] *See Brown*, 189 F.Supp.2d 665 (refusing to enforce a UIM policy limitation of two years from the date of the accident); *Gordon*, 914 S.W.2d 331 (refusing to enforce a policy limitation of two years from the date of the accident). *See also Elkins*, 844 S.W.2d 423 (refusing to enforce a policy limitation of one year from date of accident). Furthermore, each of these decision

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the injured persons' losses are fully compensated by a combination of reparation benefits, liability insurance and, if necessary, underinsured motorist coverage." *Saxe v. State Farm Mutual Auto. Ins. Co.*, 955 S.W.2d 188, 191 (Ky. Ct. App. 1997); *Kentucky Nat'l Ins. Co. v. Bottoms*, No. 2002-CA-001767-MR, 2003 WL 22801196 at * 2 (Ky. Ct. App. Nov. 25, 2003). The *Gordon* court noted that,

> [a]lthough KRS 304.39-230 does not specifically refer to suing one's insurance carrier for uninsured or underinsured benefits, it makes no sense to allow two years (or more) to file a suit against an uninsured or underinsured tortfeasor and yet permit the insurer to escape liability if the suit involving it is not filed within one year. Such would not only be an unreasonably short time, but it would complete frustrate the no-fault insurance scheme.

914 S.W.2d at 332.

[2]Pike repeatedly argues that the contractual limitation period in his UIM policy is two years. That is simply incorrect. The contractual limitation in his policy is a flexible one which coexists with the MVRA's limitation period. In the case before us, the limitation period amounts to two years only because Pike did not receive any reparation benefits which would have tolled the contractual limitation period.

made clear that the rulings should not be construed to prohibit insurance companies from contracting with their insureds for a shorter period of time to file a contract claim. *Brown*, 189 F.Supp.2d at 670; *Gordon*, 914 S.W.2d at 333; *Elkins*, 844 S.W.2d at 425.

Having reviewed the relevant cases, the district court concluded that the policy limitation in this case was reasonable.

> The GEICO policy in issue here contains a provision which looks to the tort liability limitation in the MVRA. The MVRA prescribes a period of two years which may be extended by the payment of reparation benefits. Thus the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor, no less than two and possibly more than two years from the date of the injury. This period, which dovetails with the tort liability period of limitations, is reasonable inasmuch as it does not require the insured under any circumstance to file suit for UIM benefits prior to the expiration of the limitation period for filing suit against the tortfeasor.

J.A. at 4 (emphasis added). We agree. We also note that the district court was careful to point out that its decision did not contradict the ruling in *Gordon*, followed in *Brown*, that the MVRA does not govern contract actions seeking UIM benefits. Rather, it was the court's reasonableness inquiry which led to conclude that the flexible limitation period contained in Pike's policy, which period was coextensive with that contained in the

MVRA, was reasonable.[3] Nothing in Pike's UIM policy requires Pike to file a claim for UIM benefits prior to suing a tortfeasor. Because the policy limitation does not conflict with period of time prescribe by Kentucky law for filing a personal injury claim arising from a motor vehicle accident, we conclude that it is reasonable, and enforceable.

Pike also argues that GEICO is estopped from raising the contractual limitation period as a defense because of its conduct in advancing the tortfeasor's $50,000 settlement offer to Pike. However, GEICO was required by statute to substitute payment or waive its right of subrogation against the tortfeasor. K.R.S. 304.39-320(4). Additionally, to establish equitable estoppel, a plaintiff must show that his insurer fraudulently deceived or misled him into believing that it had abandoned or waived its limitation defense. *Johnson v. Culvert Fire Ins. Co.*, 183 S.W.2d 941 (Ky. Ct. App. 1944); *National Surety Marine Ins. Corp. v. Wheeler*, 257 S.W.2d 573 (Ky. Ct. App. 1953). Pike can make no such claim here since it is undisputed that the first time he notified GEICO that he had been in an accident, let alone asserted a UIM claim, was six months after the contractual limitation period expired.

Finally, Pike contends that equity and fairness warrant a reversal of the district court's ruling and that the ruling violates public policy. According to Pike,

> [t]he practical effect of affirming the Western District would mean that plaintiffs would lose their UIM claims because of something over

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[3]Contrary to Pike's assertions, the *Gordon* court addressed the issue of which limitations period to apply to an uninsured motorist claim where a policy limitation has already been deemed unreasonable – and concluded that the statutory fifteen-year period for bring contract claims applied. *See Brown*, 189 F.Supp.2d at 670. The district court in *Brown* noted that "[t]he question of reasonableness was not an issue before the [*Gordon*] court."

> which they have no control – which insurance company has primary responsibility for payment of his medical bills. It is manifestly unfair that [Pike] be penalized and forfeit a very viable and valuable UIM claim, for which he paid premiums for years, on limitations grounds simply because worker's compensation paid his medical bills rather than a PIP carrier.

Final Brief of Plaintiff-Appellant, at 24. This argument is meritless. It has long been established that parties may contract for a shorter limitation period than that provided by statute, and there is nothing sinister about the contractual limitation in this case which relies on Kentucky law. The district court did not dismiss Pike's claim because his medical bills were paid by the worker's compensation carrier, but because Pike failed to assert his claim for UIM benefits in a timely manner. Consequently, no public policy has been violated and there is no basis upon which to reverse the district court's ruling.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's dismissal of this case on the ground that it was commenced after the contractual limitation period expired.

Filed: March 29, 2006

(3)

File date June 26, 2006

No. 06-13

In The Supreme Court of the United States

WENDELL PIKE,

Petitioner,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit

SUPPLEMENTAL APPENDIX

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No. 3:04CB-131-S
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

WENDELL PIKE — Plaintiff

v.

GOVERNMENT EMPLOYEES INS. CO., — Defendant

MEMORANDUM OPINION

This matter is before the court on motion of the defendant, Government Employees Insurance Companies ("GEICO"), to dismiss the action on the ground that the claim is barred by the limitation of actions provision contained in the automobile insurance policy under which the plaintiff seeks underinsured motorist benefits.

This action was filed in the Hardin County, Kentucky Circuit Court on February 5, 2004, over three years after the date of the automobile accident which underlies the plaintiff's claim in this case. The action was removed to this court by GEICO, a Maryland corporation, under our diversity jurisdiction. GEICO now seeks dismissal.

When a motion to dismiss is made, the court must take the allegations of the complaint as true and grant dismissal only when it is beyond doubt that the plaintiffs can prove no set of facts entitling them to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

On November 21, 2000, Wendell Pike and Tammy Stear were involved in an automobile accident in Louisville, Kentucky. At the time of the collision, Pike was operating a

United States Postal Service truck while working as a mail carrier. Worker's Compensation has paid and is continuing to pay his medical bills for injuries he claims he sustained in the accident.

Stear had liability insurance providing a maximum benefit of $50,000.00. Pike settled his claims against Stear for the policy limit on May 15, 2003. Pike then filed the present action against GEICO, his insurer, for underinsured motorist benefits ("UIM").

Pike's policy with GEICO contained the following provision pertaining to underinsured motorist coverage:

> ACTION AGAINST US:
>
> Suit will not lie against us unless the ***insured*** and his legal representative have fully complied with all the policy terms. Any legal action to recover underinsured motorist benefits must be commenced within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident.

GEICO Automobile Policy Amendment, Underinsured Motorist Coverage, Kentucky, Conditions, ¶3.

Under Kentucky law, the period for filing an action to recover UIM benefits is two years from the date of the injury or from the last basic or added reparation payment made by any reparation obligor, whichever last occurs. KRS 304.39-230(6). In this case, no basic or added reparation payments were made. Worker's compensation has paid Pike's medical bills and expenses. Worker's compensation payments are not "basic" or "added reparation payments" contemplated by the statute, *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 61 (Ky. 2001). Therefore, the worker's compensation payments did not

toll the running of the statute of limitations on his claims against the tortfeasor. The statute of limitations on any tort liability claim expired two years after the accident. Thus the limitation on his claim for UIM benefits, defined by the policy to be co-extensive with the statutory tort liability period, also expired two years after the accident.[1] As this action was not filed until thirty-eight months after the accident, the claim is barred and the action must be dismissed.

Pike contends that the general, fifteen-year statute of limitations for contract claims, KRS 413.090(2) applies to his claim by virtue of the holding in *Brown v. State Auto*, 189 F. Supp.2d 665 (W.D.Ky. 2001).

In *Brown*, the United States District Court for the Western District of Kentucky looked to the holding of the Kentucky courts in *Webb v. Kentucky Farm Bureau Insurance Co.*, 577 S.W.2d 17 (Ky. App. 1978); *Elkins v. Kentucky Farm Bureau Insurance Co.*, 844 S.W.2d 423 (Ky. App. 1992); and *Gordon v. Kentucky Farm Bureau Insurance Co.*, 914 S.W.2d 331 (Ky. 1995) in an attempt to determine whether a contractual limitation of two years was reasonable and should be enforced in the case before it. The court noted in *Brown*, 189 F.Supp.2d at 670 that "The *Gordon* court did reiterate that an insurer may contract with its insured for a shorter period of time in which to file uninsured benefits claims, so long as the contractual limitations period is reasonable. [*Gordon*, 914 S.W. 2d] at 333." The court then concluded that the policy provision before it which required UIM claims to be brought within two years of the date of the accident was unreasonable. The court held that

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[1] The statute speaks in terms of the time of the "injury". The parties appear to be focus on the time of the accident. There does not appear to be any question, however, that the injury to Pike occurred at the time of the accident. Therefore, this is a distinction without a difference under these facts.

> [T]he argument that the two-year limitation period here is unreasonable has considerable support in *Gordon's* express finding that it would be "illogical to adopt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tortfeasor is in fact an uninsured motorist." *Id.* At 332....This Court believes that the fair reading of *Gordon* demonstrates three key points: (1) that the MVRA does not govern contract-based actions seeking underinsured motorist benefits; (2) that any contractual limitations period must be reasonable; and (3) that it is illogical- in other words, unreasonable- to require a plaintiff to sue her own insurer for uninsured motorist benefits before being required to discover whether or not the tortfeasor is in fact an uninsured motorist. This Court believes that the Kentucky Supreme Court would not make an distinction between uninsured motorist and underinsured motorist in this context, and would likewise find it unreasonable to require an insured to sue her insurer for underinsured motorist benefits prior to being required to sue the tortfeasor, and thus to determine whether or not the tortfeasor is in fact underinsured.

Brown, 189 F.Supp.2d at 670-71.

The net result of the holding in *Brown* is that the fifteen-year statute of limitations governs a claim for UIM benefits unless the insurance policy contains a reasonable limitation period prescribing another length of time. The court noted in

Brown that *Gordon* approved reasonable contractual limitation periods.

The GEICO policy in issue here contains a provision which looks to the tort liability limitation in the MVRA. The MVRA prescribes a period of two years which may be extended by the payment of reparation benefits. Thus the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor, no less than two and possibly more than two years from the date of the injury. This period, which dovetails with the tort liability period of limitation, is reasonable inasmuchas it does not require the insured under any circumstance to file suit for UIM benefits prior to the expiration of the limitation period for filing suit against the tortfeasor.

We note for the sake of clarity that our ruling does not contradict the statement in *Brown, supra.*, that "the MVRA does not govern contract-based actions seeking underinsured motorist benefits." The court has not stated that the MVRA statute of limitations applies in this action. Rather, our reasonableness inquiry has led the court to apply a flexible limitations period defined by the contract which is coextensive with the period contained in the MVRA.

For the reasons set forth hereinabove, the motion of the defendant, GEICO, to dismiss will be granted, as the claim is barred by the statute of limitations contained in the policy of insurance. A separate order will be entered this date in accordance with this opinion.

Charles R. Simpson III, Judge
United States District Court

Filed February 24, 2005

No. 3:04CB-131-S
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

WENDELL PIKE — Plaintiff

v.

GOVERNMENT EMPLOYEES INS. CO., — Defendant

ORDER

Motion having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant, Government Employees Insurance Companies, to dismiss is **GRANTED** and this action is **DISMISSED WITH PREJUDICE.**

There being no just reason for delay in its entry, this is a final order.

Charles R. Simpson III, Judge
United States District Court

Filed February 24, 2005

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was this day faxed, hand-delivered or placed in the U.S. Mail addressed as follows:

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No. 06-13

Supreme Court, U.S.
FILED
JUL 25 2006
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In The
Supreme Court of the United States

WENDELL PIKE,

Petitioner,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review whether Petitioner's claim was properly dismissed where there is no compelling reason to review Petitioner's claim, where no federal question is at issue and where a merits determination would involve the interpretation of a Kentucky automobile insurance policy under the statutory scheme and case law of the Commonwealth of Kentucky?

2. Should the Court grant certiorari to review whether the Sixth Circuit correctly determined that, under Kentucky law, Petitioner's claim was barred by the time limitations for filing a claim set forth in the automobile insurance policy issued by Respondent?

RULE 29.6 STATEMENT

GEICO Corporation is the parent company of Respondent Government Employees Insurance Company. GEICO Corporation is an indirect wholly-owned subsidiary of Berkshire Hathaway, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION/COUNTER STATEMENT	1
ARGUMENTS FOR DENYING THE WRIT	3
I. THE ISSUES IN THIS CASE DO NOT INVOLVE AN IMPORTANT FEDERAL QUESTION, AS ONLY THE INTERPRETATION OF A KENTUCKY INSURANCE POLICY UNDER APPLICABLE KENTUCKY LAW IS INVOLVED AND THERE IS NO COMPELLING REASON TO REVIEW PETITIONER'S CLAIM	3
II. THE SIXTH CIRCUIT CORRECTLY DECIDED UNDER KENTUCKY LAW THAT PETITIONER'S CLAIM FOR UNDERINSURED MOTORIST BENEFITS WAS BARRED BY HIS FAILURE TO FILE HIS COMPLAINT WITHIN THE TIME LIMITATIONS SET FORTH IN THE GEICO INSURANCE POLICY	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Brown v. State Auto Prop. & Cas. Ins. Co., 189 F. Supp.2d 665 (W.D. Ky. 2001) 7

Elkins v. Kentucky Farm Bureau Mut. Ins. Co., 844 S.W.2d 423 (Ky. Ct. App. 1992) 7

Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995) 7

STATUTES AND RULES:

Sup. Ct. R. 10 ..... 3, 4, 5, 6

K.R.S. 304.39-230(6) 1

OTHER AUTHORITIES:

Justice Harlan, *Manning the Dikes,* 13 Record of the N.Y.C. Bar Ass'n. 541 (1958) 3

Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.2 (8th ed. 2002) 5

Chief Justice Rehnquist, *The Supreme Court – How It Was, How It Is* (1987) 5

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Government Employees Insurance Company, requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION/COUNTER STATEMENT

Defendant/Respondent, Government Employees Insurance Company ("GEICO"), issued an automobile insurance policy in the Commonwealth of Kentucky to Plaintiff/Petitioner Wendell Pike ("Pike"), a Kentucky citizen. The insurance policy required the insured to file a claim for underinsured motorist benefits ("UIM") "within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident." That time limitation, established by the Kentucky legislature, is either within two years of the date of the accident or within two years of the date of the last reparation ("PIP") payment, whichever is later. K.R S. 304.39-230(6).

Pike was involved in a motor vehicle accident on November 21, 2000. Because he was in the course and scope of his employment at the time of the accident, a worker's compensation insurer paid all of his medical bills. Pike did not receive any reparation payment. On May 21, 2003, two and one-half years after the accident, Pike first notified GEICO that he had been involved in the accident and had sustained injuries as a result. Pike filed a lawsuit against GEICO in Kentucky state court on February 5, 2004 seeking UIM benefits. The filing occurred thirty-eight months after the accident and more than one year

after the expiration of the limitations period provided in the insurance policy.

GEICO filed a Motion to Dismiss in which it raised a variety of issues including Pike's violation of the policy's limitations period. At the same time, GEICO removed the case to the United States District Court for the Western District of Kentucky. Following its discussion of Kentucky statutes and pertinent cases, the District Court correctly dismissed the Complaint, finding that the suit was not filed within the insurance policy's time limitations for filing such a claim.

On appeal to the United States Court of Appeals for the Sixth Circuit, Pike raised several issues. In a concise and well-reasoned opinion, which included a thorough survey of pertinent Kentucky law, the Court affirmed the District Court's dismissal. In doing so, the Court held that the time limitation in GEICO's policy was reasonable and that Pike simply failed to timely file his suit within the time prescribed.

In a final attempt to revive his claim, Petitioner seeks review from the highest Court of the land. Because the issues presented are not worthy of review and because the controversy was correctly decided below, the writ should be denied.

ARGUMENTS FOR DENYING THE WRIT

I. THE ISSUES IN THIS CASE DO NOT INVOLVE AN IMPORTANT FEDERAL QUESTION, AS ONLY THE INTERPRETATION OF A KENTUCKY INSURANCE POLICY UNDER APPLICABLE KENTUCKY LAW IS INVOLVED AND THERE IS NO COMPELLING REASON TO REVIEW PETITIONER'S CLAIM.

A. There is no compelling reason to grant the writ.

As Justice Harlan stated nearly 50 years ago while delivering the Benjamin N. Cardozo lecture to the New York City Bar Association, "a great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court." Justice Harlan, *Manning the Dikes,* 13 Record of the N.Y.C. Bar Ass'n. 541, 549 (1958). A review of Petitioner's Questions Presented in this case attests to the accuracy of Justice Harlan's comment. Each question involves issues related to insurance policies issued in Kentucky or to the interpretation of Kentucky law. For example, Petitioner seeks a review of the "appropriate period of limitations in Kentucky," the "period of limitations [that] is reasonable under Kentucky law," and whether, under Kentucky law, payment of an insured's medical expenses by a worker's compensation carrier tolls the limitations period. Pet. i. None of the questions presented by Petitioner remotely relates to a federal question.

Supreme Court Rule 10[1] provides practitioners with a road map for what makes a case certworthy. Understanding

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[1] Supreme Court Rule 10 provides as follows:

Rule 10. Considerations Governing Review on Certiorari

(Continued on following page)

that the grant or denial of a petition for a writ of certiorari is within the discretion of the Court and recognizing that the considerations governing review set forth in Rule 10 are "neither controlling nor fully measur[e] the Court's discretion," the Rule provides that a petition "will be granted only for compelling reasons." There are no compelling reasons here.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

First, a decision by this Court on the merits would affect only a small segment of the citizenry. Indeed, such a decision would have no impact on United States citizens outside of Kentucky and would impact only those Kentucky residents who are insured with GEICO under a policy which contains the identical time limitation provision and who are claiming UIM benefits. "The Court has traditionally expended its limited time and resources on those cases that present issues of national importance. . . ." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.2 at 223 (8th ed. 2002). This case has a fatally limited scope of local, not national, importance. Given the Court's limited resources and the limited number of cases it accepts, this case is certainly not one "for which there is some 'compelling' reason for invoking the Court's jurisdiction." *Id.* As the questions raised in the petition are of no obvious practical importance other than to the parties and, perhaps, a few other Kentucky citizens, this case does not rise to a level deserving of this Court's review

B. There is no federal question.

Chief Justice Rehnquist once wrote that for a case to be worthy of review by the Court, it should involve "unsettled questions of federal constitutional or statutory law of general interest." Chief Justice Rehnquist, *The Supreme Court – How It Was, How It Is* at 269 (1987). Rule 10 includes three subsections which generally describe the types of cases which ordinarily might be worthy of consideration by the Court. A review of those subsections reveals that the over-arching consideration governing whether a petition for a writ of certiorari should be granted is that the case involves "an important federal question." Sup. Ct. R. 10(a), (b) & (c).

It is telling, yet understandable, that Petitioner makes no mention of Rule 10 or to the general considerations contained in the Rule. Indeed, no federal constitutional issue is presented; no federal statute is at issue; there is no conflict among any of the United States courts of appeals or between any United States court of appeals and any state court of last resort concerning "unsettled questions of federal constitutional or statutory law of general interest." Rather, Petitioner requests that this Court review provisions of an insurance policy issued in Kentucky to a Kentucky citizen to determine whether the lower courts misapplied Kentucky statutory and case law in deciding that Petitioner's claim was barred by the limitations period set forth in the insurance policy.

Notably, Rule 10 was amended in 1995 to provide that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Although the Court traditionally denied petitions based on erroneous facts or misapplication of the law, the amendment was added to emphasize the "likely futility" of premising a petition on such errors. Stern, *et al., supra* at 223. Despite Rule 10's admonishment, a primary focus of Petitioner's argument is that the lower courts "misapplied Kentucky law." Pet. 12. However, "[t]he Court does not sit simply to correct such errors." Stern, *et al., supra* at 223.

In sum, Petitioner has failed to demonstrate that any of the criteria which make a case worthy of review by the Court are met. There is no federal question, constitutional issue or federal statutory interpretation involved in this case. There is no conflict among the United States courts of appeals or any state court of last resort. This case has no general importance beyond the particular facts of the

case, and while the case is obviously important to the parties, a merits determination by this Court would have significance only to other similarly situated GEICO insured Kentuckians who have a claim for UIM benefits. Petitioner has presented no compelling reason for this Court to grant the petition for a writ of certiorari. Accordingly, Respondent respectfully requests that the writ be denied.

II. THE SIXTH CIRCUIT CORRECTLY DECIDED UNDER KENTUCKY LAW THAT PETITIONER'S CLAIM FOR UNDERINSURED MOTORIST BENEFITS WAS BARRED BY HIS FAILURE TO FILE HIS COMPLAINT WITHIN THE TIME LIMITATIONS SET FORTH IN THE GEICO INSURANCE POLICY.

Despite the fact that Petitioner has presented five questions for review, the sole question decided below was whether GEICO's time limitation for filing a UIM claim was reasonable under Kentucky law. The Sixth Circuit correctly decided that the policy limitation was reasonable and valid and that Petitioner's claim was not timely.

Petitioner, both in the courts below and in this Court, relies upon a trilogy of cases[2] in his effort to spare his case from dismissal. Those cases were fully briefed below and the lower courts thoroughly considered them in concluding that Petitioner's claim was barred as untimely. The Sixth Circuit's opinion from which Petitioner seeks review

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[2] *Brown v. State Auto Prop. & Cas. Ins. Co.*, 189 F. Supp.2d 665 (W.D. Ky. 2001); *Elkins v. Kentucky Farm Bureau Mut. Ins. Co.*, 844 S.W.2d 423 (Ky. Ct. App. 1992); *Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky.1995).

presents a concise, yet thorough analysis of the issues presented and the authority relied upon by Petitioner. Rather than adding unnecessary length to this brief by repeating the lower court's analysis, the Court is commended to a review of the Sixth Circuit's opinion found in Petitioner's Appendix. Respondent is unable to articulate more clearly the rationale for affirming dismissal (and for denying the writ) than was stated by the Sixth Circuit. Thus, no more need be said about the merits of Petitioner's Argument.

CONCLUSION

Because the petition fails to satisfy any criteria for justifying review by this Court and because the case was correctly decided below, Respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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